APPEAL NO. 011336
FILED JULY 25, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 22, 2001. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for either the 14th or 15th quarter of eligibility. The hearing officer held both that the claimant had not made a good faith search for employment and that the claimant was not unemployed or underemployed as the direct result of his impairment.

The claimant has appealed. He argues that he is underemployed as a direct result of his impairment because his doctor has told him he cannot look for work. He argues that all Texas Rehabilitation Commission (TRC) programs are full time and that he has shown compliance with the good faith search requirement because he was enrolled in a TRC-sponsored program. The claimant argues that more than 10 days passed between the respondent's (carrier) receipt of the claimant's Application for [SIBs] (TWCC-52) for the 15th quarter and the carrier's request for a benefit review conference (BRC). The carrier responds that the hearing officer's decision should be supported, and argues facts from the record that require affirmance.

DECISION

We affirm the hearing officer's decision.

FACT SUMMARY

The qualifying period for the 14th quarter ran from August 31, 2000, through November 29, 2000; and for the 15th quarter, the applicable period was from November 30, 2000, through February 28, 2001.

The claimant drove a water delivery truck for his employer and on _____, slipped and fell. He was diagnosed with a strain and sprain of his neck and shoulders. His restrictions involved no overhead work, repetitive work involving his neck, or lifting over eight pounds.

During the qualifying periods, the claimant wrote down on his TWCC-52s a weekly income of $100.00 to $125.00. He testified that this amount was paid by a relative for answering the telephone for a small business and setting up service appointments. The telephone that he answered was his own. The claimant eventually said that the amounts paid were more to help him out, as few calls were actually answered by the claimant on a daily basis.

In evidence is an amended TRC plan dated November 20, 2000. (No copy of the plan that was amended by this document was offered into evidence.) The plan indicates

that the TRC will provide services from February 1, 2001, through April 30, 2001, by paying for the claimant for taking three listed courses. The services to be provided from the date of the amendment through the end of May 2001 are "counseling and guidance." No evidence was offered as to what, if any, counseling and guidance were received.

The claimant testified that he had taken two courses during the qualifying period for the 14th quarter; however, there was only one certificate of completion dated in October 2000. There are some documents, labeled as student schedules, from a local community college that are attached to the copy of the 14th quarter TWCC-52. They are dated at various times but appear to show enrollment in three consecutive courses for a period from September 8 through November 17, 2000. The October 2000 certificate of completion appears to match one of these.

The amended plan also required the claimant to search for employment and did not make this condition contingent upon any other aspect of the plan. The claimant testified that he had attended class essentially on Fridays only. Concerning the 15th quarter, the evidence includes a certificate of completion for one course that the claimant said he enrolled in for February 2001 and completed on the 23rd of that month. There is a "purchase order inquiry," perhaps from the TRC, for two courses encompassing the last part of the 15th quarter qualifying period and going into the next qualifying period.

The claimant did not search for any employment during the qualifying periods under review.

PARTICIPATION IN A FULL-TIME REHABILITATION PLAN

The hearing officer did not err in declining to find that the claimant made a good faith search for employment commensurate with his ability to work as provided in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(d)(3) (Rule 130.102(d)(3)). While the hearing officer indicates that the analysis of a full-time plan is made in terms of class hours consumed in a week, this is not so. Rule 130.101(8) makes clear that "any" plan provided by the TRC or a private provider may be considered a full-time rehabilitation plan so long as it contains the elements further listed in this rule, none of which encompass a minimum number of hours of course work in the given period. *See also* Texas Workers' Compensation Commission Appeal No. 000677, decided May 17, 2000, for a discussion of this rule and the preamble thereto.

We do agree, however, that there must be evidence of a plan, as well as compliance with it, for a determination to be made that the claimant has been "enrolled in, and satisfactorily participated in" such a program. The plan in evidence outlines course work that runs into the qualifying period for the 15th quarter but none for the 14th quarter. There is one certificate of completion in evidence where it appears that the claimant was enrolled for three classes; the fate of the other classes is unknown. Moreover, the plan in evidence appears to obligate the claimant to search for employment, and there was no

evidence offered of any counseling or guidance the claimant may have received for the qualifying period for the 14th quarter. With the evidence in this posture, the record supports the hearing officer's determination that the claimant did not, for the 14th or 15th quarter, prove that he satisfactorily participated in a full-time vocational rehabilitation program under the auspices of the TRC (even if "enrollment" was proven through admission of the amended plan into evidence).

DIRECT RESULT

The hearing officer did not err in finding that the claimant was not underemployed as the direct result of his impairment. As the hearing officer noted, many of the claimant's restrictions are linked to a noncompensable knee condition. He could further consider that the claimant asserted that he worked 40 hours per week for his relative, yet earned less than minimum wage, and that the lower wages were, consequently, the result of something other than his ability to perform work within his restrictions.

CARRIER WAIVER

The hearing officer did not err in finding that the carrier did not waive its right to dispute the 15th quarter by not requesting a BRC in 10 days. Because the carrier had not paid benefits for the previous quarter, the applicable rule is Rule 130.108(e), which does not provide a waiver if a BRC is not requested. The hearing officer properly applied this rule to the facts.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as

to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge